Supreme Court, U.S.
FILED
MAY 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-1388

In The Supreme Court of the United States

October Term, 1988

LO SHIPPERS ACTION COMMITTEE,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Contrary to the contentions of the Government and the railroads, this is a matter which merits Supreme Court review. Neither respondent has disputed the monetary significance of this proceeding nor the importance of the issues to the national transportation community and to the nation as a whole in view of the burgeoning reliance of the nation's railroads on the private car fleet.[1]

In 1966, the Congress legislated a cost-of-ownership car-compensation standard for railroad and private cars alike. That standard grew out of a Congressional determination to alleviate recurrent car shortages which plagued the nation for many years. Pet. 14. The car compensation standard first legislated in 1966 and reinforced in 1976 has not been changed by Congress in the intervening years in any way which would justify the perverse construction of the statute

[1] The two briefs in opposition are referred to, respectively, herein as "Govt. Br." and "RR Br."

by the ICC or the passive acquiescence of the U.S. Court of Appeals for the District of Columbia Circuit in that construction. The attempts by the respondents to demonstrate otherwise are little more than legal sleight-of-hand.

I. WHETHER § 11122(b) REQUIRES COST-BASED ALLOWANCES IS A QUESTION OF SUBSTANTIAL IMPORTANCE MERITING CONSIDERATION BY THIS COURT

A. The Importance Of This Question Is Not Challenged

Whether § 11122(b) requires cost-based allowances or whether it permits market-based allowances in disregard of costs is, if not the most important issue in transportation today, certainly one of the most important. Aside from the obvious monetary impact of the decision on the country's rail shippers and railroads, with its impact on the nation's car supply (Pet. 7-11), the time, effort and money that have been put into litigating this issue testify to its importance.[2] And, as pointed out in LOSAC's supplemental brief, filed May 8, 1989, the erroneous decision below has already been used by the same court as a precedent for imposing on shippers additional millions of dollars for the cost of moving empty private cars to repair facilities, an expense which, for more than 40 years, has been held by the ICC and the courts to be the responsibility of the railroads. The unfair adverse effects of the decision below cannot now be contained or controlled except through a correct construction of the statute by this Court.

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[2] It is now generally recognized by almost all elements of the transportation industry that the car surpluses of the early and middle 80's have ended.

B. This Is Purely A Legal Issue To Be Decided By Application Of The *Chevron* Principles[3]

The thrust of both briefs in opposition is that the ICC's choice of so-called market-based allowances over cost-based allowances was correct on economic grounds and in accord with the general policies of the Staggers Rail Act of 1980.[4] But the issue here is not whether the ICC abused its discretion in so holding. The issue here is simply whether the ICC and the Court below correctly construed § 11122(b).[5] That issue is a purely legal issue, and application of the *Chevron* principles leads to the inescapable conclusion that Congress directly and unambiguously addressed that precise issue in 1966 and decreed that allowances for private cars shall be cost-based. In all the years from 1966 right up to the present, Congress has never varied from that standard. It is not the role of the Courts (nor that of the ICC) "to overturn congressional assumptions embedded into the framework of regulation." *F.P.C. v. Texaco*, 417 U.S. 380, 400 (1971).

Chevron is also particularly important here because of its holding that a reviewing Court may not find an ambiguity in a statute without first consulting its legislative history, which the Court below made no pretense of doing. "If a Court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

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[3] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[4] Respondents (Govt. Br. 5–6; RR Br. 3) purport to look askance at the rise in rates of compensation which would have occurred if they had been reflective of the costs of ownership. At that time costs of ownership were increasing due to the effect of inflationary interest rates. With the decline in interest rates in the last few years, allowances based on ownership cost would have fallen just as dramatically. The Court should be aware that the cost-of-ownership standard does not result in a rigid allowance structure. On the contrary, the influence of current costs of capital and the effect of the size of the national car fleet on the transportation-use ratio introduce considerable flexibility into the formula. *See Car Service Compensation — Basic Per Diem Charges*, 362 I.C.C. 884, 886 (1980).

[5] All statutory references are to Title 49 U.S.C.

467 U.S. at 843, n. 9. If this Court will so much as look at the words of the statute *as actually enacted by Congress*[6] and at their legislative history, it will be immediately apparent that the "gap" which the Court below purported to find in the statute is non-existent. Pet., App. C, pp. 2–4.

C. Congress Has Never To This Day Departed From The Cost-of-Ownership Car-Compensation Standard It Enacted in 1966

In 1966 Congress legislated a rail car compensation standard to correct widespread car shortages. Pet. 14; *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 922 (3d Cir. 1980). No respondent denies that. Instead, they argue (Govt. Br 9–10; RR Br. 9–10) that Congress' intent in 1966 has been superseded by subsequent legislative events. The railroads go so far as to argue (RR Br. 11) that "Congress' intent in 1966 is irrelevant." To the contrary, Congress' intent when it first enacted a car-compensation standard is highly relevant here in view of the axiomatic principle of statutory construction that the words of a statute must be interpreted in light of the purpose Congress sought to serve.[7] [8]

Congress' revision of the car compensation standard in 1976 was a reaction to continuing car shortages and was a direct attempt to encourage car ownership "through adoption of [car compensation] rates that would more accurately reflect the actual costs of purchasing, owning and maintaining freight cars." *Consolidated Rail Corp. v. United States*,

[6] This point is emphasized because both the ICC's and the Court's decision were based *solely* on the 1978 "revised" version of §11122(b).

[7] *Atchison, T. & S. F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980). *See also United States v. Champlin Refining Co.*, 341 U.S. 290 (1951); *The Pietro Campanella*, 73 F. Supp. 18, 26 (S.D. Tex. 1947); Pet. 13–14.

[8] Moreover, a statute should be construed in a manner which effectuates rather than frustrates the major purpose of the legislative draftsmen. *Porter v. Prudential Insurance Co. of America*, 470 F. Supp. 203, 206 (W.D. Tex. 1979). The Commission has repeatedly recognized that allowances which are below cost of ownership are a "disincentive to the purchase of cars" and, hence, are contrary to the Congressional purpose underlying §11122(b). Pet. 10.

619 F.2d 988, 992 (3rd Cir. 1980).[9] Shortly after passage of the 4-R Act amendments to the car-compensation provision of the Interstate Commerce Act, the Commission commented in an implementation proceeding that "[t]he 4R Act requires per diem rates to fully compensate all cost elements, including current cost of capital."[10] The Commission further recognized, in the same proceeding, that "[t]he revision of basic per diem is designed to remove any disincentives to invest in cars, that may have been built into the old formula through failure to include all cost associated with the ownership of cars."[11] And in a further decision in the same case, 362 I.C.C. at 884, the ICC specifically recognized that the purpose of Congress in amending § 1(14)(a) in 1976 was "to require that car service compensation be based upon the ownership expense of freight cars by type of car."

In 1980, Congress considered but rejected proposals to institute a market-based car-compensation regime. Pet. 19–22. The central significance of that is that the law of car compensation did not change in 1980. Clearly, in retaining the cost-of-ownership standard without change, Congress cannot

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[9] The railroads' attempt (RR Br. 8) to use the *Conrail* case as support for market-based allowances at the expense of cost-based allowances is a gross distortion of what that case stands for. The holding in that case was a strong affirmation of the need for car compensation to be based on current costs associated with car ownership. That the court therein stated (at 996) that the non-cost factors enunciated in section 11122(b) must also be taken into account did little more than state the obvious and in no way detracts from the need for such factors to be considered in the context of a cost-of-ownership framework. In 1980, the Commission went to great pains to show how the non-cost factors enumerated in the statute should be analyzed and decided in the context of the cost-of-ownership compensation standard, and, of even greater significance, the Commission explicitly stated that those non-cost factors were not to be considered in determining "basic car-hire",but only in deciding whether to increase basic car-hire to create an incentive for the purchase of car types found to be in inadequate supply. *See Car Service Compensation — Basic Per Diem Charges*, 362 I.C.C. 884, 886–87 (1980). See also note 13 below.

[10] *Car Service Compensation — Basic Per Diem Charges*, 358 I.C.C. 716, 738 (1977).

[11] Id.

be presumed to have added new meaning to old language,[12] particularly when the new meaning is something that Congress considered but expressly rejected.[13] The respondents seek to impart new and different meaning (hence, the railroads' allegation (RR Br. 11) of the irrelevancy of the intent of Congress in 1966 when it first enacted a car-compensation standard) to the car-compensation standard by virtue of a conference committee report that contains some language that supposedly supports market-based car compensation. Govt, Br. 10; RR Br. 10. Even if that report could be said to be part of the legislative history of provisions enacted 14 years previously and last amended four years previously, and even if it correctly represented the views of the Conference Committee on the Staggers Act, which it clearly did not, committee reports are not the law and cannot be interpreted to change the meaning clearly expressed in the statute itself. Furthermore it is neither the function nor the prerogative of a committee of the 1980 Congress to attempt to "interpret" the laws enacted by earlier Congresses. ". . .[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960); *Consumer Product Safety Com'n. v. GTE Sylvania*, 447 U.S. 102, 117 (1980). And certainly the 1980 Congress cannot "amend" the intent which the

[12] *Catano v. Local Board No. 94 Selective Service System*, 298 F. Supp. 1183 (E. D. Pa. 1969).

[13] Most of the numerous so-called "decisions" of the ICC since 1980 on which the ICC and the railroads rely (Govt. Br. 5, n.1; RR Br. 10, n.18) are bootstrap arguments. Most of those "decisions" were simply notices or advance notices of proposed rulemaking. And in none of the cited "decisions" was the issue here involved litigated. *Brae Corp. v. United States*, 740 F. 2d 1023 (D.C. Cir., 1984) (Govt. Br. 11; RR Br. 8, n. 15) supports LOSAC, not respondents. In *Brae*, the Court held (p. 1059) that the ICC's discretionary powers "do not allow the Commission to evade the explicit requirements of section 11122, requirements that directly address the car hire issue and that reflect a specific set of Congressional concerns." LOSAC has never argued that the second sentence of section 11122(b) should *not* be considered in construing the statute. But it clearly cannot be given effect to the end that the cost-of-ownership standard is nullified. The non-cost factors assume meaning only in the context of the cost-of-ownership framework. *See Car Service Compensation — Basic Per Diem*, 362 I.C.C. 884, 886–887 (1980).

1966 and 1976 Congresses had in enacting the cost-based standard.

In addition, this particular report is apocryphal and the circumstances of its birth make it highly suspect. The conference on this long and complex bill lasted only nineteen minutes. Only eight of the sixteen members of the committee were present. The conferees never met as a body, but they agreed in advance to give the staff a blank check to write the report. The Chairmen of the House and Senate committees later agreed on the language, which was not made available in writing to the conferees themselves. The committee did not participate in drafting the report and did not know what was in it until shortly before it was published. 126 Cong. Rec. H9752, daily ed. Sept. 25, 1980; 126 Cong. Rec. H10081, Sept. 30, 1980; R. Eckhardt *Market Dominance in the Staggers Act*, 48 I.C.C. Prac. J. 684 (Sept./Oct. 1981). Such a report can carry no weight when pitted against the pages and pages of the true legislative history of § 11122(b).

Neither brief makes the slightest attempt to meet LOSAC's arguments that the Court must look at the 1966 enactment and the 1976 amendment (the "replaced" statute) and their legislative history, which both clearly show that Congress has directly and unambiguously decreed that allowances for private cars shall be based on costs of ownership. The Government brief never even mentions this crucial issue. The railroads argue that the statute does not require that the shippers are "invariably" entitled to recover the "full" or "complete" costs of ownership, but they never say what costs they think shippers *are* entitled to recover under § 11122(b).[14] In fact the ICC and the railroads have *never* said what they think the first sentence of § 11122(b) *does* mean.

LOSAC's position is that shippers are entitled to receive whatever compensation § 11122(b) says they are entitled to receive and it is for this Court to say what "determined by

[14] If their n. 11, p. 5 is intended to deal with the issue, it is certainly cryptic. Do they admit allowances should be based on all costs except a return? If so, that is answered by § 11122(b) itself which directs inclusion of current costs of capital as one of the elements of cost. *Car Service Compensation — Basic Per Diem Charges*, 358 I.C.C. 716, 735 (1977).

the expense of owning and maintaining" private cars means. Whatever it means, it cannot just be ignored on the theory that the second sentence of § 11122(b) nullifies and eviscerates the first.[15]

Once the meaning of § 11122(b) is determined, it is obviously the duty of the ICC to adjudicate the lawfulness of the assailed allowances under that test. *General American T. Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940) (Govt. Br. 11; RR Br. 9) clearly stands for the proposition that, upon appropriate request, the ICC is to require a railroad to publish and "make effective" the "reasonable allowance" to which a shipper is entitled, from which it follows that if the published allowance is unreasonable and unlawful, the ICC is to require publication and effectiveness of an allowance that removes that unlawfulness. LOSAC did not get the adjudication to which it was entitled because of the ICC's misconstruction of the statute. The ICC's statement (Pet. App. B, 30–31; see RR Br. 12) that LOSAC did not show the challenged allowances were unlawful "under any standard that takes into account market conditions as they relate to all of the statutory factors" is the result of its misconstruction of the statute. LOSAC clearly demonstrated the unlawfulness of the allowances, giving effect to the factors in the second sentence of § 11122(b) in the manner intended by Congress, i.e., within the cost-of-ownership framework.

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[15] Both the Government and the railroads challenge LOSAC's assertion that the effect of the ICC decision is to "deregulate" allowances (Govt. Br. 11–12; RR Br. 13). But if the ICC has absolute discretion whether or not to regulate allowances with no substantive standard to guide it, and it refuses to apply any standard, that is de facto deregulation. It is no answer to say that in "individual" cases, the ICC will consider the lawfulness of allowances. That is merely a sham to avoid ruling on the challenged allowances. LOSAC had standing to bring this complaint on behalf of its members, and it challenged "individual" allowances of each railroad defendant. Whether allowances are published in a national tariff or an individual tariff does not alter the fact that they are the applicable allowances of individual railroads. And the standards of § 11122(b) are the same whether they are applied in this case or one involving only one shipper and one railroad.

II. SECTION 11122(b) CANNOT POSSIBLY BE IGNORED ON THE THEORY THAT § 11122(a) GIVES THE ICC DISCRETION WHETHER OR NOT TO REGULATE ALLOWANCES.

The question of the proper construction of § 11122(b) cannot be avoided under any theory. If § 11122(b) is correctly construed, the absurdity of arguing that § 11122(b) may be ignored because, under § 11122(a) the ICC has "discretion" to enforce or not enforce that standard as it sees fit, is so obvious that it requires no comment. On the other hand, if § 11122(b) does not require adherence to some cost-based standard, an inquiry into whether the ICC has authority to regulate or not regulate allowances is an exercise in futility. The decision on § 11122(a) necessarily has to follow rather than precede the construction of § 11122(b). Had it actually been the first issue decided there would have been no occasion even to consider the meaning of § 11122(b), as the railroads note (RR Br. 2, n. 2).

The proposition that § 11122(b) may be ignored because § 11122(a) gives the ICC discretion not to regulate allowances is so lacking in merit that it is difficult to believe that the Government and the railroads could seriously argue it or that a Court of Appeals could seriously consider it.[16] In any event, the simple answer to that argument is found in the ICC's own words, in an order served November 19,

[16] The argument rests *solely* on the absence of the word "shall" in § 11122(a). If this fact had any significance, it was cured by § 212 of the Railroad Revitalization and Regulatory Reform Act, which neither brief mentions, which, in addition to amending § 1(14)(a), also provided, 90 Stat. 47:

> (b) The Commission *shall*, within 18 months after the date of enactment of this Act, revise its rules, regulations, and practices with respect to car service, in accordance with the amendment made by subsection (a) of this section. (Emphasis added)

The ICC responded to this mandate as to railroad-owned cars but has not done so for privately owned cars. *Car Service Compensation — Basic Per Diem Charges*, 358 I.C.C. 716 (1977); 359 I.C.C. 138 (1978); 362 I.C.C. 884 (1980). The attention of this Court is especially invited to these cases both because the ICC specifically notes that in 1976 Congress amended § 1(14)(a) "to require that car service compensation be based upon the ownership expense of freight cars by type of car" and because the ICC also specifically notes how the factors in the second sentence of § 11122(b) are to be construed *within the cost-of-ownership framework*.

1987, in Ex Parte No. 328, *Investigation of Tank Car Allowance System — Petition For Clarification or Reconsideration*, pp. 2–3, where the ICC said:[17]

> The railroads' position reflects a misunderstanding of the nature of section 11122. They are correct that, under section 11122(a), the Commission's authority to prescribe car compensation is discretionary. *See LOSAC, supra,* at page 8. However, section 11122(b), which contains the standards governing car compensation, provides that car compensation "*shall* be determined" by the factors enumerated in that section. It is thus clearly mandatory, and by its terms governs all mileage allowance tariffs regardless of whether or not they were prescribed by the Commission under section 11122(a). There is no support in the statute, its legislative history, or applicable case law for the view that we may apply section 11122 standards to some cases and ignore them in others. (ICC italics)

CONCLUSION

Whether § 11122(b) requires cost-based allowances for private cars is a question of great importance to shippers and railroads alike. Considering the superficial and desultory treatment of this issue by the Court below, particularly its failure to consider the statute actually enacted by Congress and its legislative history and its failure to fairly consider and meet LOSAC's arguments, this Court should grant the petition for a writ of certiorari to review the judgment below.

Respectfully submitted,

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[17] Copies of this unpublished decision have been lodged with the Court.